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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LAFONZO RAY TURNER, Defendant and Appellant.	A120727 (Contra Costa County Super. Ct. No. 05-060811-7)

LaFonzo Ray Turner (appellant) was convicted, following a jury trial, of first degree murder. On appeal, he contends (1) the prosecutor committed prejudicial misconduct when she argued facts not in evidence, and defense counsel was ineffective for failing to object to this unsupported argument; (2) the trial court erred in failing to instruct the jury sua sponte on voluntary manslaughter as a lesser included offense; and (3) he was denied a fair trial because jurors twice saw him being transported to or from the courtroom in physical restraints. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On July 5, 2006, appellant was charged by information with the murder of Guy Howard (Pen. Code, § 187).[1] It was alleged that appellant had personally used and discharged a firearm (§ 12022.53, subds. (b), (c), and (d)), causing great bodily injury and death, in the commission of the offense. Two prior prison terms were also alleged. (§ 667.5, subd. (b).)

[1] All further statutory references are to the Penal Code unless otherwise indicated.

On November 2, 2007, at the conclusion of a jury trial, appellant was found guilty as charged. The jury also found the firearm allegation true.

On February 1, 2008, after appellant waived a jury trial on the prior prison term allegations, the court found both priors true. The court then sentenced appellant to a term of 25 years to life in state prison on count one, with an additional term of 25 years to life in prison on the gun use enhancement, for a total prison term of 50 years to life.

On February 13, 2008, appellant filed a notice of appeal.

FACTUAL BACKGROUND

On the evening of July 31, 2003, Guy Howard was shot to death on a street in Antioch. Appellant was eventually charged with his murder.

Prosecution Case

Lorieann L. testified that on July 31, 2003, she and her son, Daniel F., were visiting Daniel's cousins, Lisa L., Carmen L. and Ramiro G., on J Street in Antioch. At around 8:00 p.m., Lorieann was sitting in the passenger seat of her car with the door open, in front of the cousins' home. She was fixing Carmen's watch and talking to her son and the three cousins. It was still light outside. Lorieann noticed an adult Black, or possibly Cuban, male walking by her car as he crossed to the other side of the street. She saw the man stop and talk to another adult Black male. Both men were standing on the sidewalk near a blue truck.

Lorieann saw the first man looking as if he was going to hug the second man, but then she heard a gunshot. The second man went down on the ground. The first man was halfway across the street walking in her direction when she saw him lift his shirt and tuck a gun that he was holding in his right hand into his pants. She saw no weapon in the hands of the man who was shot, nor did she see any kind of fight between the two men. There was no one else near the two men during the incident. Lorieann got the children inside the house, told a cousin to call 911, and then went to comfort the man who had been shot.

The man with the gun had a limp. Lorieann also noticed that his eyes were protruding from his face. She guessed his height to be five feet ten inches to six feet tall.

He might have been in his mid-thirties and he had a medium build. He was wearing a gray shirt and pants that might have been part of a matching outfit and black tennis shoes. The outfit might have been made of a silk or satin-type material. The man's hair was short and he looked "a little rugged."

Lorieann was not sure she would recognize the man with the gun if she saw him again. She looked at appellant in the courtroom and could not say "100 percent for sure" that he was the same man. However, his eyes were similar, his height, skin color, and build were "about right."[2] Lorieann had viewed a number of photo lineups and could not identify the shooter, although in one photo lineup someone looked similar to the shooter.

Daniel F., Lorieann's son, who was 17 years old at the time of trial, testified that, on the evening in question, he was outside of his relatives' house with his cousin Ramiro, his aunt Lisa, and his mother. His mother was in the passenger seat of her car, he was standing near her on the sidewalk talking to her. He saw what "looked like two people were walking and they met and started talking." It did not seem like they were arguing or fighting. Both people were African-American adult males.

The men talked for less than five minutes, and then Daniel heard a "pow." One man grabbed his stomach and fell. The other man just turned around and walked until he got to the corner; then he ran. The man who was shot backed up three or four feet just before the other man shot him. The shooter had the gun in his right hand and put it in his waistband as he walked away. The shooter walked with a limp; his face did not look beaten up or bloody.

Daniel described the shooter as approximately five feet eleven inches to six feet tall, about 21 to 27 years old, with a medium build. He was wearing a gray shirt and black or dark purple pants. The gun was black with a brown wooden handle. It looked like a small .38 caliber handgun. Daniel was shown two lineups. In one of the lineups,

[2] Lorieann had described the man to police as "Black." When police asked if he could have been Puerto Rican, Cuban, or Hispanic, she said "it was a possibility."

he picked out someone who was closest to what he remembered the shooter looking like, but he was not 100 percent sure.

Lisa L., who lived on J Street in Antioch, testified that on July 31, 2003, Lorieann, Lorieann's son Daniel, and Lisa's nephew Ramiro, were visiting her. At about 8:00 p.m., they were standing or sitting around Lorieann's car, which was parked outside of Lisa's apartment complex.

Lisa initially denied seeing anyone except a bald Hispanic man wearing a white jacket walking by. However, she acknowledged that she did not want to be in court and that she was afraid of testifying in the case. She claimed that she did not remember what she had told police four years earlier, but testified that she did tell the police the truth when she gave a statement just after the shooting.

Lisa acknowledged telling a detective that she saw the victim walking with a Hispanic male adult with a bald head. She also saw a third person who was wearing a gray sweatshirt and pants. She claimed that she did not see any of their faces. She acknowledged truthfully telling the police that the shooter was a Black adult male. He was with the other men for only a few minutes before she heard a "fire crashing sound." She saw the shooter put the gun in the front of his pants after the shooting. After the shooting, Lisa put the children in the house and called 911.

The shooter's gun was black and looked like a small 9 millimeter. Lisa had truthfully described the shooter to police as being between six feet and six feet two inches tall, with a medium build and medium complexion. He looked between 35 and 40 years old.

Edd Stevenson testified that he was married to, but separated from, appellant's sister Ronda Jackson. In 2003, Stevenson and Jackson had been married about 14 years. On July 31, 2003, he and Jackson were living in Sacramento. He had known appellant for about five years.

On the evening of July 31, 2003, Stevenson, Jackson, and their two children who were then 11 and 14 years old were at home when appellant showed up alone. He had

driven there in a maroon or burgundy Malibu automobile. They went into the bedroom to talk. Appellant was talking to Jackson, but Stevenson was there listening, too.

Appellant, who seemed a little agitated, said he was having problems in his town, which Stevenson knew was Antioch. Appellant said "his uncle had a problem, and he handled it." He explained that his uncle had been beaten up or assaulted. Appellant was referring to Keith Whittington, who was also Jackson's uncle. Appellant said that his uncle pointed out the person who had assaulted him and appellant "handled it." Appellant also said he had to get rid of a "strap," which Stevenson knew meant a gun.

Appellant was worried about the police coming to the house, and said "they may come around." He asked to stay with them for a while and they let him. He stayed with them for a few days.

Stevenson admitted he had previously been convicted of a theft-related offense. He and Jackson had traveled to court together.

Ronda Jackson testified that appellant is her brother. In July 2003, Jackson was living in Sacramento with her husband, Edd Stevenson, and their two children. Keith Whittington was her and appellant's uncle. Jackson testified that she still loved her brother.

Late on the evening of July 31, 2003, appellant arrived at Jackson's house in a Malibu automobile. Jackson, Stevenson, and their children were at home. Appellant seemed anxious and said he wanted to talk to Jackson and her husband. They talked in her bedroom. Appellant told them that Uncle Keith had been arrested for a murder he had not committed. Appellant said that he (appellant) had committed the murder because "some guy had beat up Uncle Keith, and Uncle Keith had pointed the guy out to him, and he handled it." Appellant also said that "some lady he knew, I think she was sitting on the porch, saw him running by and asked him if he was okay." Jackson let appellant stay at her house. He stayed at least a couple of days, maybe a week.

Jackson also testified that appellant's girlfriend, Tammy Turner, kept calling to see if appellant had arrived yet, so when appellant got to her house, she told him he

needed to call Tammy. Jackson further testified that appellant has had a limp since about mid-1995, and his walk looks like that of someone who is intoxicated.

Sharon Jeffrey, who acknowledged that she had numerous theft-related convictions, along with convictions related to drugs, assault, escape from custody, and guns, testified that at around 8:00 p.m. on July 31, 2003, she was sitting on a brick wall next to an empty car lot in Antioch polishing her nails. She heard a sound and then saw a Black man she recognized running by her across the car lot. She described the man to police as about six feet tall, 160 pounds, with short black hair and a long, skinny face. She asked him if he was okay.

The man was wearing sweatpants or jogging pants and as he went by Jeffrey saw him take something that she thought was gloves and stuff it down his jogging pants. She also noticed a car driving in the direction the man was headed; the driver's face was swollen. She told an officer at the time that the car was maroon or burgundy. She believed the driver of the car was a man she knew named Keith and the man who ran by her was Keith's nephew. She tried to holler at Keith, but he did not look at her; he was sitting low in the car.

Jeffrey testified that she had identified both the uncle and the nephew in a photo lineup. At the preliminary hearing and at trial, she said she did not recognize appellant as the shooter. She also testified that, on the day of the shooting, she had been drinking and using drugs, including rock cocaine. She was on probation at that time, and was also on probation at the time of trial. After the shooting, the police told her they could put her somewhere and protect her if she knew something and was scared to tell them. She had met up with Keith a couple of times after the shooting.

Antioch police found a .9 millimeter bullet casing on the street near where the shooting took place. Contra Costa County criminalist David Stockwell testified that no blood was found on the victim's pants, but blood was found on his sweater, on the right chest. There were also six holes in the right sleeve of the sweater, consistent with the sleeve being bunched and a bullet entering. There was soot on the sleeve of the sweater, which indicated that the gun was no more than two or three feet away when it was fired.

Defense Case

Ramiro G., who was 16 years old at the time of trial, testified that, on July 31, 2003, he lived with his mother, Rosalia G., in Antioch. At the time of the shooting, he was 12 years old and was with his cousin Daniel at Lisa's and Carmen's home. Ramiro and Daniel were outside on their bikes when the shooting occurred.

Ramiro testified that the shooter was Edgar Guerrero. Ramiro acknowledged that when he was questioned by police three days after the shooting, he did not tell them that Guerrero was the shooter. Instead, he told police that he saw two Black adult males approaching each other from opposite directions. The men were talking, not arguing, when one of them put his left hand on the victim's shoulder while holding a gun in his right hand. Ramiro heard only one shot, and then saw the shooter walk away in the same direction from which he had come before starting to run after he turned on 10th Street. The shooter had a limp. He was "kind of" tall, maybe five feet seven or eight inches, but taller than the victim.

The police had asked Ramiro if there was a Hispanic man with the two Black men, but he had truthfully said the two men were alone. He did not tell police that the shooter was Edgar Guerrero because he was scared. He did not mention Guerrero to the authorities until the defense investigator came to his house four years after the shooting and showed a photo of Guerrero, although he had previously told his mother that Guerrero was the shooter shortly after the shooting. He thought the photo of Guerrero looked like the shooter; he was "pretty sure" it was him. Ramiro did not see the shooter's face at the time of the shooting; he saw his hair, which was short, and also saw that he had a goatee. He did not tell police at the time that the shooter had a goatee. He was able to tell that the shooter was Edgar Guerrero by the fact of his hair and goatee.

Ramiro's mother, Rosalia G.,[3] testified that on July 31, 2003, her son came home and told her he had seen someone get shot. The next day, he told her that "Edgar," who

[3] Rosalia was in custody at the time of trial for failing to comply with a subpoena to come to court in this matter. ~(RT 452)~

walks with a little limp, was the shooter. He said he had not told police about Guerrero because he was scared. Rosalia acknowledged that Guerrero is a Hispanic male, though he is dark complected with frizzy hair, and not very tall.

Rosalia was questioned by police on September 2, 4 and 5, 2003. She and her son were told that appellant was in jail for the shooting and also showed them a lineup that included a photo of Guerrero, but she never told them that her son said that Edgar Guerrero was the shooter and there was an innocent man in jail. She first told this to a defense investigator in August 2006.

Officer Jeff Calibro testified that in the early morning of July 31, 2003, before the shooting, he investigated a disturbance at the Antioch fairgrounds involving a gold 1988 two-door Buick that shooting victim Guy Howard said he was driving. The car looked as if it had been in an accident and was parked in an awkward location. Clothes were strewn around outside the car.

Stephanie Souza of the Contra Costa County crime lab testified that one fingerprint from the Buick matched Darryl (Keith) Whittington and two matched Guy Howard.

A police officer identified as "Officer Dee" testified that he had been assigned to this case and, in September 2003, he had showed Rosalia G. a photograph of Edgar Guerrero. She said she knew him as a dark skinned Hispanic with buggy eyes who walked with a limp. Officer Dee talked to Ramiro on September 3, 2003. Ramiro did not identify anyone in a photo lineup that contained a photograph of Keith Whittington. Ramiro did not mention Edgar Guerrero. He described the shooter as a Black male adult, and said he did not get a good look at his face.

On August 24, 2006, Officer Dee showed Sharon Jeffrey[4] photo lineups that included the photographs of Keith Whittingon and appellant. Jeffrey identified "Keith" from the photograph of Whittington and also identified the photograph of appellant as "Keith's nephew." During a previous interview with Jeffrey, on March 19, 2004, Jeffrey

[4] In Officer Dee's testimony, Jeffrey is identified as Sharon Nelson.

said that four or five hours after the shooting, Keith and his nephew (appellant) picked her up and took her for a car ride during which Keith threatened her if she talked to police. Keith also offered her money.

Officer Dee spoke with appellant's sister, Ronda Jackson,[5] and her husband, Edd Stevenson, several times after the shooting. During the first conversation on July 22, 2004, Jackson was upset and said she was fearful of her brother and was very hesitant to talk to Dee. Stevenson told him that when appellant got to their house he was acting "supremely paranoid" and did not leave their house for approximately three days.

On September 22, 2004, Jackson and Stevenson called Officer Dee. Jackson told him that appellant had come to their house on what she believed was July 31, 2003. Appellant had said that Whittington had been arrested for murder, but that " 'Keith didn't do it, I did it.' " Appellant said, " 'I took care of it.' " During a conversation the following day, Jackson said her brother told her what had happened so she would not be shocked if the police arrived at her house. She affirmed that appellant had said he had handled it and also related that appellant had said a female he knew saw him leaving the scene after the shooting and asked if he was okay. Finally, Jackson said appellant has a limp.

Barry LaBerge, a construction superintendent, testified that, in July and August 2003, he filled out time cards for employees at a construction site in Hercules. The cards reflected that appellant worked the day of the shooting and the day after. Appellant did not work the next three days (a Saturday through Monday), but did work the remainder of the following week. Appellant's hours were from 7:00 a.m. to 3:30 p.m. LaBerge estimated that it would take about one hour and 45 minutes or two hours to drive from the construction site in Hercules to Sacramento.

The trial court took judicial notice of appellant's height, which was measured at six feet seven inches.

[5] In Officer Dee's testimony, Jackson is identified as Ronda Stevenson.

DISCUSSION

I. *Prosecutorial Misconduct*

Appellant contends the prosecutor committed prejudicial misconduct when she argued facts not in evidence, and defense counsel was ineffective for failing to object to this unsupported argument.

A. *Trial Court Background*

The defense theory was that appellant's uncle, Keith Whittington, rather than appellant, shot the victim, Guy Howard. During her final closing argument, the prosecutor stated, inter alia: "Look at the facts of the case, ladies and gentlemen. No doubt that Guy Howard beat up Keith Whittington. He had the swollen injuries and everything. Would Guy Howard ever have let Keith Whittington walk up to him, a guy that he beat up so badly, a swollen face within the past 24 hours.

"There were two knives on Guy Howard in closed position. A guy that Guy Howard [had] beat up recently so there are injuries on his face and cuts and bruises and we've got the pictures, could just walk up to Guy Howard and be talking to him as if there's no problem? Does that make any kind of sense? Of course not. Keith Whittington wasn't going to be able to get in that position with Guy Howard. Guy Howard had beaten him up once.

"If I see Keith Whittington coming up the street, what's reasonable to believe that Guy Howard is going to do? He's not there to give me a present, see how I'm doing, ask about the weather. I just beat this guy up. There's going to be an argument, another brawl. And Keith is going to get what Guy gave him earlier that day. There's nothing—nothing, no confrontation.

"Guy doesn't take out any of the knives that he's got on him. Why is that? Because it wasn't Keith Whittington that did it. It was LaFonzo Turner. Keith Whittington knew full well that he wasn't going to walk right up, calm as day and get that close without something going down."

A short time later, the prosecutor stated: "Keith Whittington did not commit the murder. He pointed out the man who beat him up. You look at the manner and how the

individual, LaFonzo Turner, approached Guy Howard. Guy Howard wasn't in fear of anything. That's the thing. He didn't take out weapons as if he was afraid. Someone that you've beaten up coming towards you and you've got weapons on you, you start getting those ready. There's going to be an altercation and none occurred in this case."

No evidence was admitted at trial regarding Guy Howard's possession of knives at the time of his death. Defense counsel did not object to any of these comments by the prosecutor.

B. *Legal Analysis*

Both parties agree that the prosecutor committed misconduct by arguing facts not in evidence during her final closing argument. (See *People v. Hill* (1998) 17 Cal.4th 800, 827-828.) Respondent argues, however, that the issue is waived because defense counsel failed to object to the improper argument and request an admonition, which according to respondent, would have cured any possible harm. (See *id.* at p. 820.) Appellant disagrees, arguing that the prejudice resulting from the prosecutor's comments was too great for an admonition to have cured the harm. We agree with respondent that, had defense counsel objected when the prosecutor began talking about Howard's knives, the court could have effectively stopped the improper argument and told the jury to disregard the prosecutor's comments, for which there was no evidentiary support. Appellant argues that if the issue is waived, defense counsel provided ineffective assistance by failing to object and request an admonition.

To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

Here, assuming counsel's failure to object constituted inadequate representation, her ineffective assistance was not prejudicial because appellant has not established that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

First, the prosecutor's comments about Guy Howard's knives constituted only a small portion of her closing arguments, in which the emphasis was on the variety of evidence pointing to appellant as the shooter. This strong evidence of guilt, discussed at length by the prosecutor, included eyewitness testimony describing the shooter as a tall Black male adult who walked with a limp. Appellant is a tall Black male adult who walks with a limp.[6] None of the several witnesses to the shooting said they saw any swelling or cuts on the shooter's face, even though Keith Whittington had been beat up the night before and Sharon Jeffrey, who saw him just after the shooting, described his face as swollen.

There was also evidence of flight, in that appellant went to Sacramento shortly after the shooting and stayed with his sister, Ronda Jackson, and his brother-in-law, Edd Stevenson, for approximately three days. In addition, Jackson and Stevenson testified that appellant told them that someone had beat up Whittington, and Whittington "had pointed the guy out to him [appellant], and he handled it." Appellant also said he had to get rid of a "strap," i.e., a gun. Jackson further testified that appellant said that "some

[6] Appellant notes that he is extremely tall—six feet seven inches—and that none of the eyewitnesses described the shooter as extraordinarily tall. However, as the prosecutor pointed out, the witnesses did describe the gunman as "tall," many of them saying he was about six feet tall. In light of all of the evidence, that witnesses did not say the shooter was extremely tall is not particularly convincing evidence of appellant's innocence. Appellant also observes that Ramiro G. testified that the shooter was Edgar Guerrero. However, Ramiro claimed that he did not see the gunman's face, which adds to the other questionable aspects of his identification of Guerrero. In addition, defense counsel focused her argument on Whittington as the shooter, even stating that "it's possible that Edgar Guerrero is the shooter, that Ramiro is correct about that detail, but I think what's most likely and more probable is that the shooter is Keith Whittington."

lady he knew, I think she was sitting on a porch, saw him running by and asked him if he was okay."

Officer Dee confirmed much of what Jackson and Stevenson testified to, testifying himself that, in a first conversation with Stevenson and Jackson, almost a year after the shooting, Stevenson had said that when appellant got to their house he was acting "supremely paranoid" and did not leave the house for about three days. Jackson was upset and said she was fearful of her brother and initially was hesitant to talk to Dee, but in a subsequent conversation told him that appellant had said that Whittington "didn't do it, I did it." She also affirmed that appellant said he had handled it and also that a female he knew saw him leaving the scene and asked if he was okay.

Sharon Jeffrey testified that, as she sat on a wall near the scene of the shooting, she heard a sound, and then saw appellant, whom she recognized as Keith's nephew, as he ran by her stuffing something down his jogging pants, and asked him if he was okay. She also saw Keith driving by slowly in car; he had a swollen face. Officer Dee confirmed that Jeffrey identified Whittington as "Keith" and appellant as "Keith's nephew" in photo lineups. Respondent, as did defense counsel, makes much of the fact that Jeffrey was a drug addict and under the influence at the time of the incident, and claims her testimony was therefore not reliable. As the prosecutor reminded the jury, however, this argument ignores the independent corroboration provided by appellant's sister, Ronda Jackson, who testified that appellant said a woman had recognized him and asked if he was okay.

Thus, the prosecutor's argument regarding the strong evidence presented at trial that demonstrated appellant's guilt clearly overshadowed her comments about Howard's knives, as did the evidence itself. Appellant nonetheless argues that the prosecutor's mention of Howard's knives and of his failure to take them out of his pockets when the shooter approached undermined the defense theory that Whittington was the shooter. He further argues that, because evidence of the knives had not been admitted, the defense was foreclosed from arguing that Howard might have threatened to pull out one of his

knives and attack the gunman, thereby precluding the claim that the shooting was manslaughter under the theories of heat of passion or imperfect self-defense.

However, even had evidence of the knives been admitted, the prosecutor's argument on this point was speculative—as is the argument appellant claims he was foreclosed from making. Moreover, the trial court instructed the jury that "[n]othing that the attorneys say is evidence," and that "[i]n their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence."[7] (See CALCRIM No. 222.) This instruction, which we must presume the jury followed (see *People v. Smith* (2007) 40 Cal.4th 483, 517-518), also makes it highly unlikely that the jury gave significant weight to the prosecutor's speculative, unsupported comments.[8]

Accordingly, we conclude that defense counsel's failure to object and request an admonition was not prejudicial because appellant has not established that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

II. *Failure to Instruct on Voluntary Manslaughter*

Appellant contends the trial court erred in failing to instruct the jury sua sponte on voluntary manslaughter based on the theory of heat of passion as a lesser included offense.

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[7] The court further instructed the jury: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom or during a jury view. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence." (See CALCRIM No. 222.)

[8] Appellant nevertheless insists that this was a close case, stating that the jury deliberated "for parts of six days." In fact the jury deliberated for, at most, 15 hours; the remainder of the trial, including the taking of evidence and arguments by counsel took some 24 hours. That the jury carefully reviewed the evidence, which included testimony by many different witnesses, does not make this a close case.

Section 192 defines manslaughter as "the unlawful killing of a human being without malice." The offense is voluntary manslaughter when the killing occurs "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.)

"Thus, '[t]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, "this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances," because "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man." [Citation.]' [Citations.] [¶] ' "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' " [Citation.]' [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*).)

"A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.] ' "Substantial evidence" in this context is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed. [Citations.]' [Citation.]" (*Manriquez*, *supra*, 37 Cal.4th at p. 584.) We employ a de novo standard of review, independently determining whether a voluntary manslaughter instruction should have been given. (*Ibid*.)

In *Manriquez*, *supra*, 37 Cal.4th 547, the defendant was convicted of, inter alia, murder based on his shooting a victim at a bar, and the defendant argued that the trial

court should have instructed the jury on voluntary manslaughter. Our Supreme Court found that a witness's testimony that the victim approached the defendant, called him names, asked if he had a gun, and dared him to use it even as the defendant repeatedly told the victim to calm down and that he did not want any problems, "contained no indication that defendant's actions reflected any sign of heat of passion at the time he commenced firing his handgun at the victim. There was no showing that defendant exhibited anger, fury, or rage; thus, there was no evidence that defendant 'actually, subjectively, kill[ed] under the heat of passion.' [Citation.]" (*Id*. at p. 585.) Thus, the subjective element of the heat of passion theory was not satisfied. (*Ibid*.)

The court further found that even were there evidence that the defendant acted in the heat of passion, "the evidence of provocation was insufficient to satisfy the objective requirement, that is, that defendant's heat of passion resulted from sufficient provocation caused by the victim," given that "such provocation 'must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.' [Citation.]" (*Manriquez, supra*, 37 Cal.4th at pp. 585-586.) The court concluded that the name calling and taunting to which the witness testified "plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment." (*Id.* at p. 586.) The court held that the trial court had properly refused to instruct the jury on voluntary manslaughter based on the theory of heat of passion. (*Ibid*.)

Here, the evidence of heat of passion was at least as weak as that in *Manriquez*. There was no testimony that appellant showed any particular emotion as he walked up to Howard, conversed with him, put his hand on Howard's shoulder, and shot him. The sole evidence of appellant's state of mind during the interaction came from his statement to his sister and brother-in-law after the shooting that "some guy had beat up Uncle Keith, and Uncle Keith had pointed the guy out to him, and he handled it." Thus, the only evidence of appellant's mindset suggests that he acted for revenge, not in the heat of passion. (See *People v. Rich* (1988) 45 Cal.3d 1036, 1112 (*Rich*) [heat of passion may never be based on passion for revenge]; accord, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704; *People v. Burnett* (1993) 12 Cal.App.4th 469, 478.)

Moreover, even were there subjective evidence of heat of passion, the evidence of provocation was insufficient to satisfy the objective requirement. Appellant asserts that he was "entitled to be provoked" when he learned that Howard had beat up his uncle. We do not agree that knowledge of this fact was " 'such that an average, sober person would be so inflamed that he or she would lose reason and judgment.' " (*Manriquez, supra,* 37 Cal.4th at pp. 585-586.) Appellant further argues that Howard might have said things to appellant during their conversation—such as taunting appellant about the weaknesses in his and Whittington's family or threatening appellant with the two knives in his pocket—that would have provoked appellant into the heat of passion. Aside from the fact that such words would be quite unlikely to satisfy the subjective requirement for showing heat of passion (see *Manriquez, supra,* 37 Cal.4th at pp. 585-586), these scenarios are based on nothing more than speculation on appellant's part.[9]

In these circumstances, the trial court had no sua sponte duty to instruct the jury on voluntary manslaughter based on the theory of heat of passion.

Finally, even had the court erroneously failed to so instruct, any such error was necessarily harmless, as is demonstrated by the jury verdict of first degree murder, which, as the court instructed, required a finding that appellant acted deliberately, that he "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." (See CALCRIM No. 521.) The jury also was told that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (See *ibid.*) The jury could have convicted appellant of

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[9] This case is also distinguishable from *People v. Barton, supra,* 12 Cal.4th 186, 202, cited by appellant, in which, according to witness testimony, the defendant had just learned the victim had threatened his daughter, tried to run her car off the road and, when he and his daughter confronted the victim, the victim called the defendant's daughter a " 'bitch' " and acted " 'berserk.' " Before firing his gun, the defendant, "[s]creaming and swearing," ordered the victim to " 'drop the knife' " and get out of his car, threatening to shoot him if he did not do so. (*Ibid.*) Our Supreme Court concluded that this testimony provided substantial evidence from which a reasonable jury could conclude that the defendant shot the victim in a heat of passion. (*Ibid.*) The facts in the present case are plainly quite distinct from those in *People v. Barton.*

second degree murder, but did not. In light of these jury instructions and the factual determination necessarily made by the jury in convicting appellant of first degree murder, any error in failing to give the instruction would have been harmless. (See *Manriquez, supra*, 37 Cal.4th at p. 586.)[10]

III. *Jurors' Observation of Appellant In Physical Restraints*

Appellant contends he was denied a fair trial because jurors twice saw him being transported to or from the courtroom in physical restraints.

A. *Trial Court Background*

On the last day of jury selection, defense counsel advised the trial court that she had just learned that appellant had been transported to and from the courtroom in restraints. The following discussion ensued:

"MS. BARKER [Defense Counsel]: Your Honor, it's just been brought to my attention that Mr. Turner has been brought out in shackles and handcuffs in front of the jury transported to or from the holding cell or wherever he's taken during the lunch break.

"THE COURT: Okay.

"MS. BARKER: I am very disturbed that this has happened. I believe that the jury is—will be biased and has been tainted by observing him in those conditions and I—the last time I had a trial in this department, my client was transported through a back hall so jurors never saw him. He was taken into an elevator and down and underneath the—

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[10] Appellant claims that "[h]eat of passion does not negate premeditation; it negates malice." Appellant is incorrect. "The two concepts [of heat of passion and premeditation] are related in that they are mutually exclusive. As the Supreme Court explained in *People v. Sanchez* (1864) 24 Cal. 17, 30, 'The intent to kill . . . must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation.' This discussion continues to form the basis for the standard CALJIC No. instruction [CALJIC No. 8.20] on the subject." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 251; see also CALCRIM No. 521 ["A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time"].)

somehow never in the hallway. And so I guess that may depend on the courtroom that the defendant is in and I have not tried a case in this courtroom but I am very concerned that that has happened and believe there should be some type of admonishment at the very least.

"THE COURT: Okay. We do have an issue just with the design of this building. Any courtroom on this side of the hallway there is no tunnel that goes underneath. So on this side of the building—third floor and second floor—at some point and someone who is in custody is brought across the short hallway from one side to the other, for security policy they must be in restraints. We try to be as discrete as possible and I've worked with staff closely because we do a number of serious cases here to get the individual over hopefully early rather than later so that we have fewer jurors in the hallway. It's a little more difficult during jury selection because we have that many more jurors out in the hallway. Do we know when Mr. Turner was brought over?

"THE BAILIFF: Just about eight minutes ago.

"THE COURT: Okay.

"THE BAILIFF: It's extremely busy.

"THE COURT: Often times when an individual is brought over it depends on how much staff we have. I'm happy to admonish the jury and I usually leave it to defense counsel. Some want it mentioned, some don't. I'm happy to admonish them and to also admonish them that whether or not he is in custody is not an issue for their consideration and I'll do that when the group comes in. Unfortunately in short of changing the building we can't solve the problem completely. I will work with staff to try and get your client across the hall—it's the short end of the hallway—and we can try to do it as quickly as possible and early as possible. It will be easier after the jury has been selected because we won't have quite as many people. I would note that there is a capital case next door and there are trials going on, I believe, in both 28 and 24 in the other courtrooms so there are other extra people in the hallway not all whom are ours, but I will definitely admonish the jury if that's your request.

"MS. BARKER: Yes. And I'm also concerned that they may think that because he's shackled that that's different than other inmates that are treated or people in custody.

"THE COURT: Okay. I'm happy to address that if you'd like. My bailiff is telling me he's not shackled.

"MS BARKER: Oh, I thought he was.

"THE COURT: Just handcuffs.

"MS. BARKER: Okay.

"THE COURT: Okay. So we'll be happy to address the jury when they come in.

"MS. BARKER: Okay. Very well."

The trial court thereafter admonished the jury as follows: "Some of you out in the hallway may or may not have noticed Mr. Turner being brought across the hallway by one of the security staff and he may have had handcuffs on. This is a standard procedure within the court house. It is nothing unusual for this case. It is the same for all cases. He may or may not be in custody. Whether he is or not is not a matter for your consideration in any way shape or form and it can't be part of your analysis or evaluation of the evidence. Everyone okay with that? All right."

Nearly two weeks later, during trial, defense counsel again raised the issue:

"MS. BARKER: . . . [¶] . . . Mr. Turner asked me to put on the record that he was brought into court or across the hall in what he says were 'shackles,' chains on his feet, as I understand the situation. Apparently, it was a different staff memoranda.

"THE COURT: Is that correct?

"THE DEPUTY: Yes, Your Honor. That's how we transport them.

"THE COURT: Is there a reason he was in leg shackles?

"THE DEPUTY: That's MDF[11] policy. I wasn't aware of special orders. We take the restraints off.

"THE COURT: My understanding is he would not be in leg chains, use a belly chain with handcuffs.

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[11] "MDF" may stand for Martinez Detention Facility.

"THE DEPUTY: He had a belly chain.

"THE COURT: I've been on this side of the hall for three years, and am under the impression that we do not use leg shackles unless there's a concern. We haven't had that issue.

"THE DEPUTY: I'll take corrective action on that, Your Honor.

"THE COURT: Taken care of? Thank you. [A brief recess was taken.]

"MS. BARKER: . . . [¶] And I wanted to put on the record I'm concerned I did not make a sufficient record about Mr. Turner's leg chains. I'm objecting. I don't think that there was good cause to have him in leg chains in front of the jury. And I'm asking for a mistrial [based] on that. The area is in view of the jury, across the hall. I want to make sure that I've made the proper record.

"THE COURT: Do we know that there were jurors in the hall when he was transported across the hallway?

"MS. BARKER: Mr. Turner has informed me that there were jurors. I was not present. I cannot say.

"THE COURT: What—I don't believe that this calls for a mistrial. I will be more than happy to admonish the jury if you like. Some like the admonishment, some don't. I believe I've addressed them once already about it, advised them that whether he's in restraints or not has no bearing whatsoever on the evaluation of the evidence and cannot be part of the deliberations. I will take care of that.

"MS. BARKER: I'm not asking for an additional admonishment. I'm asking for a mistrial.

"THE COURT: Noted. [¶] I don't believe that this rises to that level. I've taken care of it. It will not occur again."

B. *Legal Analysis*

The general law regarding the permissibility of subjecting a defendant to restraints has been explained by our Supreme Court: " '[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints.' [Citations.] . . . . [¶] The decision of

a trial court to shackle a defendant will be upheld by a reviewing court in the absence of an abuse of discretion. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 986-987.)

In the present case, appellant was not restrained in the courtroom. He was briefly observed in restraints by jurors, if at all**,** as he was transported to the courtroom. In these circumstances, even assuming the record does not establish a " 'manifest need' " for these restraints (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 986), we find that "at most the record establishes what we characterize[] . . . as minor and nonprejudicial error. (*Rich*, *supra*, 45 Cal.3d at p. 1084.)

In *Rich*, *supra*, 45 Cal.3d 1036, the defendant was escorted in leg restraints from the courthouse holding cell to the restroom on occasion "within view of jurors who happened to be in the hallway or using the men's room." Our Supreme Court found any error nonprejudicial, explaining: "In [*People v. Duran* (1976) 16 Cal.3d 282], we found prejudice because the defendant's credibility as a witness had been damaged by the shackles. We noted, however, that 'the case . . . does not involve a situation wherein the defendant was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen. [Citation.] Such brief observations have generally been recognized as not constituting prejudicial error.' [Citations.]" (*Rich*, at p. 1084; accord, *People v. Slaughter* (2002) 27 Cal.4th 1187, 1213 ["[e]ven a jury's brief observations of physical restraints generally have been found nonprejudicial"]; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 988 [same]; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 584 [same].)

The court in *Rich* concluded that, "even assuming the jurors at times briefly saw defendant being escorted in shackles and handcuffs to the courtroom or the restroom, defendant was not prejudiced thereby. The record does not indicate the jury saw defendant's shackles during the trial proceedings. On the facts of this case, any such error must be deemed harmless." (*Rich*, *supra*, 45 Cal.3d at p. 1085.)

The circumstances in the present case are quite similar to those in *Rich*, although here, in addition to the fact that any observations by jurors of appellant in handcuffs

and/or leg shackles were brief and occurred only outside of the courtroom, the court, at defense counsel's request, admonished the jury after the first incident and offered to do so again after the second incident, but defense counsel declined. We conclude that the admonition cured any conceivable prejudice arising from the first incident.

As to the second incident, appellant argues that the jury would likely wonder why the restraints had become more severe later in the trial, and would believe that something had occurred to make the judge think appellant "was an even more dangerous man." First, an admonition could have addressed this very issue and reassured the jury that the increased restraints were based on the court's revised security policy or were a mistake. (See *People v. Smith*, *supra*, 40 Cal.4th at pp. 517-518 [it is presumed " 'that jurors generally understand and faithfully follow instructions' "].) Second, the supposed dangerousness that appellant claims the jury assumed is undermined by the fact that appellant was present in the courtroom, throughout the trial, in the presence of, inter alia, the judge, the prosecutor, defense counsel, and the jury, with no restraints whatsoever and without incident. (See *Rich*, *supra*, 45 Cal.3d at p. 1085; cf. *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 636 ["A jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom has not warranted habeas relief"].)

Finally, appellant observes that several jurors expressed fears about the facts of the case and the presence of appellant's relatives at the courthouse during the trial. During deliberations, the jury foreperson wrote a note to the judge, which read: "Several members of the jury are concerned about our personal safety. We have heard testimony that a witness was threatened and a person killed. We have seen people who appear to be relatives of the accused in court and in the hallway outside of court. They have taken note of us as jurors. One of these folks that has been in attendance pointed out a juror to someone new who arrived today. [¶] During jury selection, a juror asked about the possibility of retaliation against her or her family. What gives you confidence that jurors will remain safe? What advice would you offer us in regards to things we can do to ensure our safety? What can the court do to ensure our safety? Are our names/addresses kept confidential?"

The jury foreperson's note explicitly addressed concerns based on (1) the facts of the case, in which a man was killed and a witness threatened, and (2) the actions of appellant's relatives in the courtroom and hallway. Appellant's brief wearing of restraints outside the courtroom were clearly not the focus of the jury's concern.

We conclude, as did our high court in *Rich*, that "even assuming the jurors at times briefly saw defendant being escorted in shackles and handcuffs [outside of the courtroom, appellant] was not prejudiced thereby. . . . On the facts of this case, any such error must be deemed harmless." (*Rich, supra*, 45 Cal.3d at p. 1085.)[12]

DISPOSITION

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Richman, J.

[12] To the extent appellant has raised a cumulative error argument, we have found that none of the alleged errors in this case were prejudicial. Nor do we find that the cumulative effect of any errors calls into doubt the jury's verdict or undermines the fairness of the trial in this case. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)